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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
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12 AMERANTH, INC.,
13 Plaintiff,

14 vs.

15
16 USABLENET, INC.,
17 Defendant.
18

19 AND RELATED CASES
20

CASE NOS.
11-CV-1810 JLS (NLS),
12-CV-1650 JLS (NLS)

**ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS PLAINTIFF'S
COMPLAINT**

(ECF No. 10)

21 Presently before the Court is Defendant Usablenet, Inc.'s ("Usablenet")
22 motion to dismiss Plaintiff Ameranth, Inc.'s ("Ameranth") complaint. (ECF No.
23 10.) Also before the Court are Ameranth's response in opposition, (Resp. in Opp.,
24 11-cv-1810 ECF No. 280), and Usablenet's reply in support, (Reply in Supp., 11-cv-
25 1810 ECF No. 286). The hearing set for the motion on November 8, 2012, was
26 vacated, and the matter taken under submission on the papers. Having considered
27 the parties' arguments and the law, the Court **GRANTS** Usablenet's motion to
28 dismiss.

BACKGROUND¹

I. Procedural History

This action is part of a consolidated action for patent infringement by Plaintiff Ameranth, Inc. (“Ameranth”) against various Defendants in thirty-one related cases. In the present case, Ameranth has asserted inducement of infringement and contributory infringement claims against Usablenet of three patents: U.S. Patent Nos. 6,384,850 (the ‘850 patent), 6,871,325 (the ‘325 patent) and 8,146,077 (the ‘077 patent, and collectively, the “Asserted Patents”). (ECF No. 1.) On October 4, 2012, the Court consolidated the instant action and all related actions with the lead case, *Ameranth v. Pizza Hut, Inc. et al*, Case No. 11-CV-1810 (“lead case” or “1810”), for pretrial purposes up to and including claim construction. (1810, ECF No. 279.) On September 10, 2012, Usablenet filed the instant motion to dismiss Ameranth’s complaint, including claims of induced infringement, contributory infringement, and willful infringement, for failure to meet the pleading requirements of Rule 8. (ECF No. 10.)

II. The Asserted Patents²

The ‘850 and ‘325 Patents cover an information management and synchronous communications system and method for generating computerized menus for use on specialized displays. The invention allows for the more efficient use of handheld wireless devices in the restaurant and hospitality fields by creating an integrated solution that formats data for smaller displays and allows for synchronization of data.

The ‘077 Patent also covers an information management and synchronous communications system and method for generating computerized menus for use on specialized displays, but with the added ability to manually modify the entries with

¹The factual background is based on the factual allegations as set forth in Ameranth’s Complaint, except where otherwise noted. (*See generally* Complaint, ECF No. 1.)

²This section is based on the published Patents. (*See generally* ECF No. 1-1.)

1 handwriting or voice. Generally, the '077 Patent expands upon the prior two patents
 2 and also covers the incorporation of a manual interface to allow consumers to
 3 manually input a selection.

4 As stated in the complaint, the Asserted Patents are directed to:

5 [the] generation and synchronization of menus, including but not
 6 limited to restaurant menus, event tickets, and other products across
 7 fixed, wireless and/or internet platforms as well as synchronization of
 8 hospitality information and hospitality software applications across
 9 fixed, wireless and internet platforms, including but not limited to,
 10 computer servers, web servers, databases, affinity/social networking
 11 systems, desktop computers, laptops, "smart" phones and other
 12 wireless handheld computing devices.³

13 ***A. The '850 Patent — Information Management and Synchronous***
 14 ***Communications System with Menu Generation***

15 The '850 Patent covers an information management and synchronous
 16 communications system and method for generating computerized menus for use on
 17 specialized displays. The invention allows for the more efficient use of handheld
 18 wireless devices in the restaurant and hospitality fields by creating an integrated
 19 solution that formats data for smaller displays and allows for synchronization of
 20 data.

21 ***B. The '325 Patent — Information Management and Synchronous***
 22 ***Communications System with Menu Generation***

23 The '325 Patent also covers an information management and synchronous
 24 communications system and method for generating computerized menus for use on
 25 specialized displays. The asserted claims of both the '325 and '850 Patents share the
 26 following elements: (1) a central database containing hospitality applications and
 27 data; (2) at least one wireless handheld computing device on which hospitality
 28 applications and data are stored; (3) at least one Web server on which hospitality
 applications and data are stored; (4) at least one Web page on which hospitality
 application and data are stored; (5) an application program interface; and (6) a

³ECF No. 1 at 3.

1 communications control module.

2 ***C. The ‘077 Patent — Information Management and Synchronous***
 3 ***Communications System with Menu Generation, and Handwriting and Voice***
 4 ***Modification of Orders***

5 The ‘077 Patent also covers an information management and synchronous
 6 communications system and method for generating computerized menus for use on
 7 specialized displays, but with the added ability to manually modify the entries with
 8 handwriting or voice. Generally, the ‘077 Patent expands upon the prior two patents
 9 and also covers the incorporation of a manual interface to allow consumers to
 10 manually input a selection.

11 **LEGAL STANDARD**

12 **I. Federal Rule of Civil Procedure 12(b)(6)**

13 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion
 14 the defense that a complaint “fail[s] to state a claim upon which relief can be
 15 granted,” generally referred to as a motion to dismiss. These motions provide a
 16 basis by which a party may challenge the sufficiency of a claim, including
 17 counterclaims such as those presently at issue. In *Twombly*, the Court held that an
 18 adequate complaint “requires more than labels and conclusions, and a formulaic
 19 recitation of the elements of a cause of action will not do.” *Bell. Atl. Corp. v.*
 20 *Twombly*, 550 U.S. 544, 555 (2007) (internal citation omitted). “Nor does a
 21 complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual
 22 enhancement.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550
 23 U.S. at 557). To accomplish this goal, a pleader must aver “factual content that
 24 allows the court to draw the reasonable inference that the defendant is liable for the
 25 misconduct alleged.” *Id.*

26 In alleging sufficient facts to state a claim upon which relief can be granted
 27 and survive a motion to dismiss, *Twombly* and *Iqbal* do not require a pleader show a
 28 claim is probable, but there must be “more than a sheer possibility that a defendant

1 has acted unlawfully.” *Id.* Facts “‘merely consistent with’ a defendant’s liability”
 2 fall short of a plausible entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at
 3 557). Further, the Court need not accept as true “legal conclusions” contained in the
 4 complaint. *Id.* This review requires context-specific analysis involving the Court’s
 5 “judicial experience and common sense.” *Id.* at 679 (citation omitted). “[W]here the
 6 well-pleaded facts do not permit the court to infer more than the mere possibility of
 7 misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader
 8 is entitled to relief.’” *Id.*

9 Where a motion to dismiss is granted, “leave to amend should be granted
 10 ‘unless the court determines that the allegation of other facts consistent with the
 11 challenged pleading could not possibly cure the deficiency.’” *DeSoto v. Yellow*
 12 *Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schreiber Distrib. Co.*
 13 *v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words,
 14 where leave to amend would be futile, the Court may deny leave to amend. *See*
 15 *Desoto*, 957 F.2d at 658; *Schreiber*, 806 F.2d at 1401.

16 ANALYSIS

17 I. Indirect Infringement Claims

18 Usablenet moves to dismiss Ameranth’s induced infringement and
 19 contributory infringement claims for: (1) failure to identify an underlying act of
 20 direct infringement; and (2) failure to sufficiently plead that Usablenet had
 21 knowledge of the Asserted Patents. Usablenet further contends that Ameranth has
 22 failed to plausibly plead intent to induce infringement. The Court addresses each
 23 argument in turn.

24 A. Underlying Act of Direct Infringement

25 “Indirect infringement, whether inducement to infringe or contributory
 26 infringement, can only arise in the presence of direct infringement” *Joy Techs.,*
 27 *Inc. v. Flakt, Inc.*, 6 F.3d 770, 774 (Fed. Cir. 1993). Accordingly, Ameranth’s
 28 complaint must plausibly allege that the Asserted Patents were directly infringed to

1 survive Usablenet's motion to dismiss. However, "a plaintiff need not identify a
 2 specific direct infringer if it pleads facts sufficient to allow an inference that at least
 3 one direct infringer exists." *In re Bill of Lading*, 681 F.3d 1323, 1339 (2012).

4 Here, Ameranth alleges in pertinent part:

5 [S]ystems including one or more of the Usablenet Products, as
 6 deployed and/or used at or from one or more locations by Usablenet,
 7 its agents, distributors, partners, affiliates, licensees, and/or their
 8 customers, infringes one or more valid and enforceable claims of the
 '850 patent⁴

9 [S]ystems including one or more of the Usablenet Products, as
 10 deployed and/or used at or from one or more locations by Usablenet,
 11 its agents, distributors, partners, affiliates, licensees, and/or their
 12 customers, infringes one or more valid and enforceable claims of the
 '325 patent⁵

13 Defendant actively induces others to infringe the '325 patent in
 14 violation of 35 U.S.C. § 271(b) by knowingly encouraging, aiding and
 15 abetting customers of Usablenet, including consumers and
 16 hotel/restaurant operators, to use the infringing Usablenet Products in
 the United States without authority or license from Ameranth.⁶

17 [S]ystems including one or more of the Usablenet Products, as
 18 deployed and/or used at or from one or more locations by Usablenet,
 19 its agents, distributors, partners, affiliates, licensees, and/or their
 20 customers, infringes one or more valid and enforceable claims of the
 '077 patent⁷

21 Defendant actively induces others to infringe the '077 patent in
 22 violation of 35 U.S.C. § 271(b) by knowingly encouraging, aiding and
 23 abetting customers of Usablenet, including consumers and
 24 hotel/restaurant operators, to use the infringing Usablenet Products in
 the United States without authority or license from Ameranth.⁸

25 [C]ustomers of Usablenet, including consumers and restaurant
 26 operators, use the Usablenet Products⁹

27 Considered as a whole, the Court finds that Ameranth's allegations are

28 ⁴ECF No. 1 ¶ 18.

⁵ECF No. 1 ¶ 30.

⁶ECF No. 1 ¶ 32.

⁷ECF No. 1 ¶ 42.

⁸ECF No. 1 ¶ 44.

⁹ECF No. 1 ¶¶ 19, 31, 43.

1 sufficient to allow an inference that at least one direct infringer exists. Here,
 2 Ameranth generically identifies direct infringers as “customers,” including
 3 “consumers and restaurant operators.” At the pleading stage, this is sufficient to
 4 identify an underlying act of direct infringement to maintain Ameranth’s indirect
 5 infringement claims.¹⁰ Accordingly, the Court **DENIES** Usablenet’s motion to
 6 dismiss Ameranth’s indirect infringement claims on this basis.

7 **B. Knowledge of the Patents**

8 Usablenet further contends that Ameranth’s indirect infringement claims must
 9 fail because Ameranth has failed to sufficiently plead that Usablenet had knowledge
 10 of the Asserted Patents. For an induced infringement claim, “the patentee must
 11 show . . . that the alleged infringer knowingly induced infringement and possessed
 12 specific intent to encourage another's infringement.” *Kyocera Wireless Corp. v.*
 13 *ITC*, 545 F.3d 1340, 1353–54 (Fed. Cir. 2008) (internal citations and quotations
 14 omitted). “[T]he specific intent necessary to induce infringement requires more than
 15 just intent to cause the acts that produce direct infringement. Beyond that threshold
 16 knowledge, the inducer must have an affirmative intent to cause direct
 17 infringement.” *Id.* at 1354. Similarly, for a contributory infringement claim, the
 18 patentee must show that the alleged infringer knows that the component is
 19 “especially made or especially adapted for use in an infringement of [the] patent.”
 20 35 U.S.C. § 271(c); *see also i4i P’ship v. Microsoft Corp.*, 598 F.3d 831, 850-51
 21 (Fed. Cir. 2010).

22
 23 ¹⁰The Court notes that the sufficiency of a complaint alleging direct infringement
 24 is governed by Form 18, which, besides allegations of jurisdiction, notice, and damages,
 25 requires only a statement that the plaintiff owns the patent and that the alleged infringer
 26 has been infringing the patent by making, selling, and using the device embodying the
 27 patent. *In re Bill of Lading*, 681 F.3d at 1333-34. Although Form 18 does not apply
 28 to indirect infringement claims, the Court is unconvinced that a stricter standard should
 apply when a plaintiff is alleging an underlying act of direct infringement in support of
 an indirect infringement claim rather than alleging a direct infringement claim. As to
 Usablenet’s contentions that Ameranth has failed to identify the infringing product and
 infringed claims, the Court notes that “Form 18 and the Federal Rules of Civil
 Procedure do not require a plaintiff to plead facts establishing that each element of an
 asserted claim is met” and that “a plaintiff need not even identify which claims it asserts
 are being infringed.” *Id.* at 1335.

1 Here, Ameranth contends that it has sufficiently plead Usablenet's knowledge
2 of the Asserted Patents by pleading the wide-spread awareness of Ameranth's
3 technology in the hospitality sector. (ECF No. 280 at 11.) However, the majority of
4 Ameranth's allegations relate only to public knowledge of Ameranth and its
5 technology, and say nothing about whether Usablenet knew of Ameranth and the
6 Asserted Patents. The only specific allegation in Ameranth's complaint as to
7 Usablenet's knowledge of the Asserted Patents is the statement that "Usablenet has
8 had knowledge of [the Asserted Patents]." (ECF No. 1 ¶¶ 23, 35, 47.)

9 The Court finds that Ameranth has failed to plausibly plead that Usablenet had
10 knowledge of the Asserted Patents. A conclusory allegation that Usablenet had
11 actual knowledge of the patents at issue is insufficient to set out a plausible claim for
12 indirect infringement. Although Ameranth cites to the factors used by the court in
13 *Trading Technologies International, Inc. v. BCG Partners, Inc.*, the complaint in
14 that case included an allegation that the patentee had marked its product with the
15 asserted patent's number. No. 10-cv-715, 2011 WL 3946581, at *3-4 (N.D. Ill.
16 Sept. 2, 2011). That court was thus able to infer that the defendants, as competitors
17 with the patentee, would be aware of any patents issued to the patentee. Such a
18 finding does not apply here, and the Court is unconvinced that allegations of some
19 public knowledge of Ameranth's patents is sufficient to support an inference that
20 Usablenet also had knowledge of the Asserted Patents.

21 Further, to the extent that Ameranth contends that Usablenet had knowledge
22 of the Asserted Patents as of the filing of the complaints, such allegations are
23 insufficient to support Ameranth's indirect infringement claims unless Ameranth
24 limits its claims to post-litigation conduct. Otherwise, Usablenet could be held
25 liable for acts inducing infringement or contributing to infringement prior to having
26 any knowledge of the Asserted Patents. *Proxyconn Inc. v. Microsoft Corp., C.A.*,
27 No. 11-1681-DOC, 2012 WL 1835680, at *7 (C.D. Cal. May 16, 2012).
28 Accordingly, the Court **GRANTS** Usablenet's motion to dismiss Ameranth's

1 indirect infringement claims on this basis.

2 **C. Induced Infringement Claim**

3 Usablenet further contends that Ameranth has failed to plausibly allege the
4 requisite intent for its induced infringement claims. (ECF No. 10-1 at 18.) Under §
5 271(b), “[w]hoever actively induces infringement of a patent shall be liable as an
6 infringer.” 35 U.S.C. § 271(b). “To prevail on inducement, the patentee must show,
7 first that there has been direct infringement, and second that the alleged infringer
8 knowingly induced infringement and possessed specific intent to encourage
9 another's infringement.” *Kyocera*, 545 F.3d at 1353-54 (internal citations and
10 quotations omitted). “[T]he specific intent necessary to induce infringement
11 requires more than just intent to cause the acts that produce direct infringement.
12 Beyond that threshold knowledge, the inducer must have an affirmative intent to
13 cause direct infringement.” *Id.* at 1354.

14 The Court finds that Ameranth has failed to plausibly allege intent to induce
15 infringement. The only allegation in Ameranth’s complaint as to Usablenet’s intent
16 is the conclusory assertion that “Usablenet intended that its actions would induce
17 infringement by those users.” (ECF No. 1 ¶ 20.) Although Ameranth’ cites to *In re*
18 *Bill of Lading* for the proposition that a plaintiff need only state facts allowing for
19 the inference of intent to induce infringement, Ameranth has not stated any such
20 facts here. The complaints discussed in *In re Bill of Lading* contained “detailed
21 factual allegations,” “quotations from [defendants’] websites, advertising, and
22 industry publications,” and “allegations about [defendants’] strategic partnerships
23 with other companies, their advertising, and their involvement at trade shows.” 681
24 F.3d at 1330. Ameranth’s generic allegations that “Usablenet provides instruction
25 and direction regarding the use of Usablenet Products, and advertises, promotes, and
26 encourages the use of the Usablenet Products” are insufficient to support such an
27 inference of intent. (ECF No. 1 ¶¶ 22, 34, 46.) Accordingly, the Court **GRANTS**
28 Usablenet’s motion to dismiss Ameranth’s induced infringement claims on this

1 basis.

2 **II. Willfulness**

3 “[A] willfulness claim asserted in the original complaint must necessarily be
4 grounded exclusively in the accused infringer’s pre-filing conduct.” *In re Seagate*
5 *Tech., LLC*, 497 F.3d 1360, 1374 (Fed. Cir. 2007). Although a patentee need only
6 “make out the barest factual assertion of knowledge of an issued patent,” a “bare
7 recitation of the required legal elements for willful infringement” is insufficient.
8 *IpVenture, Inc. v. Cellco P’ship.*, No. C 10-04755-JSW, 2011 WL 207978, at *2
9 (N.D. Cal. Jan. 21, 2011); *see also Avocet Sports Tech., Inc. v. Garmin Int’l, Inc.*,
10 No. 11-cv-4049-JW, 2012 WL 1030031, at *3-4 (N.D. Cal. Mar. 22, 2012).

11 Usablenet contends that Ameranth has failed to plausibly plead willfulness
12 based on any pre-filing conduct. (ECF No. 10-1 at 24-27.) The Court agrees. As
13 noted above, Ameranth’s only allegation as to Usablenet’s knowledge of the
14 Asserted Patents in Ameranth’s complaints is the statement that “Usablenet has had
15 knowledge of [the Asserted Patents].” (ECF No. 1 ¶¶ 23, 35, 47.) Ameranth’s
16 allegations regarding the allegedly wide-spread public knowledge of its technology
17 is insufficient to support an inference that Usablenet had any knowledge of the
18 Asserted Patents. Accordingly, the Court finds that Ameranth has failed to allege
19 any facts suggesting that Usablenet had knowledge of the Asserted Patents prior to
20 the filing of the complaints and **GRANTS** Usablenet’s motion to dismiss
21 Ameranth’s claims for willful infringement.

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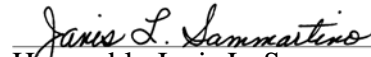
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CONCLUSION

For the foregoing reasons, the Court **GRANTS** Usablenet's motion to dismiss Ameranth's indirect infringement and willful infringement claims **WITHOUT PREJUDICE**.

IT IS SO ORDERED.

DATED: July 9, 2013



Honorable Janis L. Sammartino
United States District Judge